Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of<br><br>Communications Assistance for Law Enforcement Act | CC Docket No. 97-213 |

# REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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## I. INTRODUCTION

SBC Communications Inc., on behalf of its affiliates Southwestern Bell Telephone Company, Pacific Bell, Nevada Bell, Southwestern Bell Wireless Inc., Southwestern Bell Mobile Systems, Inc., and Pacific Bell Mobile Services, Inc. (collectively "SBC") submits its Reply Comments in accordance with the Commission's Public Notice[1] concerning the scope of the assistance capability requirements of the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. §1001 *et seq.*, the various pending Petitions raising issues concerning the sufficiency, or lack thereof, under CALEA of the existing interim standard known as J-STD-25 (TIA Subcommittee TR45.2),[2] and the joint motion of the Federal Bureau of Investigation/Department of Justice (FBI/DOJ) to dismiss the July 16, 1997 Petition for Rulemaking filed by the Cellular Telecommunications Industry Association ("the CTIA Petition").

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[1] Communications Assistance for Law Enforcement Act, *Public Notice,* CC Docket No. 97-213, DA 98-762, rel. April 20, 1998.

[2] *Id*, at pp. 3-4.

## II. DISCUSSION.

The initial comments in response to the portion of the Public Notice relating to the scope of CALEA's assistance capability requirements overwhelmingly support three basic conclusions. First, the FBI/DOJ arguments for enhanced capabilities (the "punch list") are entirely inconsistent with the language and intent of CALEA, and must be rejected. Second, the interim industry standard, J-STD-25, complies with CALEA and should be adopted by the Commission as a safe harbor under 47 U.S.C. §1006 (CALEA §107). Third, any revisions the Commission deems necessary to J-STD-25 should be remanded to the body that produced it, the TR 45.2 Subcommittee. As SBC noted in its Comments, the positions of both the FBI/DOJ and the Center for Democracy and Technology (CDT) concerning J-STD-25 represent opposite extremes, neither of which is appropriate under CALEA. By contrast, J-STD-25 represents a carefully considered, reasonable embodiment of the intent of Congress that CALEA be strictly interpreted, preserving a narrowly focused capability for electronic surveillance by law enforcement in the face of modern telecommunications technology, while at the same time ensuring that the interests of communications privacy and technological innovation are protected.

For the reasons set forth in its initial Comments, and for the additional reasons explained below, SBC strongly urges the Commission to adopt J-STD-25 in its present form as the statutory safe harbor for industry compliance with CALEA, and to reject the deficiency arguments of the FBI/DOJ and CDT as being contrary to the intent of Congress.

1. The FBI/DOJ Comments. Consistent with the FBI's "because we say so" approach throughout the CALEA implementation debate, the FBI/DOJ Comments in this

phase of the current proceeding add little, if any, substance to the record. Instead, they largely restate the FBI/DOJ Joint Petition for Expedited Rulemaking ("the Joint Petition"), to which the initial round of comments herein responded. Nevertheless, some of the assertions made in the FBI/DOJ comments bear response here because of the magnitude of their departure from the balancing of interests that Congress intended for CALEA to accomplish.

a. Call Identifying Information. As in the Joint Petition, the FBI/DOJ comments seek to impose the broadest possible interpretation of the statutory definition of call identifying information, in complete disregard for the legislative history of CALEA. The rule proposed by the Joint Petition uses the words of the statute to *define* the term, as noted in the FBI/DOJ comments at paragraph 15, but in the *application* of those words as suggested by the FBI/DOJ, all resemblance to what Congress intended is eliminated. Law enforcement would add several types of messages or signals (out-of-band signaling, post-cut-through dialed digits, subject-initiated dialing and signaling, etc.) to the category of "call identifying information" where those signals or messages are not in any way related to identifying the *telephone number* to which a target call is being routed by the network. As pointed out by CTIA (CTIA Comments at pp. 12-16) and the BellSouth companies (Comments at pp. 5-7), among others, identification of the originating and destination *telephone numbers* was all that Congress intended to cover by its definition of this term in 47 U.S.C. §1002 (CALEA §103). See House Report No. 103-827 at p. 21.

Even more significantly, with respect to "post-cut-through" dialed digits, the FBI Director himself assured Congress that pen register orders under CALEA would *not* require the provision to law enforcement of anything other than "telephone numbers that

are being called".[3] The final nail in the coffin of the FBI/DOJ position here is provided by CDT's discussion of certain aspects of CALEA's legislative history that are not apparent from the Committee Reports. See CDT Comments at pp. 20-24. Despite SBC's disagreement with CDT's criticisms of J-STD-25, (as set forth more fully in Section 2, below), we strongly support CDT's well-reasoned explanation of the true intent and meaning of the term "call identifying information". The definition that the FBI/DOJ now seek to impose simply cannot stand in the face of this record.

b. The Nature and Extent of the Commission's Review of J-STD-25. The position taken by the FBI/DOJ comments concerning the manner in which the Commission should carry out its statutory duties shows insufficient regard for CALEA's legislative history. As the joint House and Senate Committee Reports explicitly stated, it was the intent of Congress that the manner of CALEA implementation should be left to the industry, in consultation with law enforcement. (See House Report No. 103-827 at pp. 26-27.) Nevertheless, while criticizing two industry associations for what they call "...an unwarranted attempt to displace the mechanism specifically mandated by Congress in Section 107(b)", (FBI/DOJ, paragraph 49), the FBI and DOJ proceed to engage in just such an attempt, by asserting that the Commission, after reviewing only *part* of the industry's interim standard, (FBI/DOJ, paragraphs 44-46), should refuse to remand the standard to the industry, (FBI/DOJ, paragraphs 47-52), and instead throw out the *entire* standard as a basis for the Commission's own rulemaking, substituting therefor the FBI/DOJ's own "proposed standard". (FBI/DOJ, paragraphs 53-56.) Yet, at the same

[3] Joint Hearings before the Subcommittee on Technology and the Law of the Senate Committee on the Judiciary and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103rd Cong., 2d Sess., at 50 (1994) (Testimony of FBI Director Louis Freeh), as cited in CTIA Comments, at p. 13.

time, the FBI/DOJ acknowledge (at paragraph 56) that the Commission is free to base its proposed rule on "...whatever...standards the Commission preliminarily concludes are warranted under Section 107(b)...".

Nothing in the legislative history supports the FBI/DOJ argument that, in effect, industry only has one chance to establish a set of standards sufficient to comply with CALEA, and failing that must see the good-faith effort of over two years summarily voided and replaced by a completely separate set of rules written by law enforcement. While the FCC clearly has the *authority* to issue a completely new set of standards of its own, it is not *compelled* to do so, as the FBI/DOJ comments suggest. Neither is the Commission under any duty to confine its review of J-STD-25 to only those portions of the standard that have been attacked as deficient in the petitions filed by CDT and FBI/DOJ. Indeed, it is difficult to comprehend how a wholesale setting aside of the entire interim standard, for which the FBI/DOJ argue, could be legally sustainable without a full and fair review by the Commission of all of the standard's provisions.

There is no hint whatsoever, either in CALEA's legislative history or in the substantial body of existing law governing the FCC's rulemaking authority, that the Commission could not choose to discharge its duty regarding the safe harbor standard by adopting whatever portions of J-STD-25 that it deems sufficient under CALEA as the basis for its own rulemaking, while directing the industry to substitute other technical requirements for those parts of the industry standard, if any, that the Commission finds to be deficient. Contrary to the convoluted arguments of the FBI/DOJ, this would be the most timely and effective way for the Commission to ensure a reasonably achievable standard that meets the balancing test mandated by Congress. As SBC suggested in its

initial comments, the FCC also may, and should, endorse the current provisions of J-STD-25 as a safe harbor for the industry until such time as any part thereof may be found to be deficient through the rulemaking process. The Commission is not required, as suggested by the FBI/DOJ, to take an "all or nothing" approach to this comprehensive, consensus document. Moreover, as pointed out by CTIA (CTIA Comments, p. 21), a complete substitution of an FCC rule for an industry standard would, contrary to the assertions of the FBI/DOJ, actually impede the viability of CALEA compliance in the future, as continuing and rapid technological changes could be addressed quickly and efficiently by an industry standards body. In stark contrast, changes in a comprehensive FCC rule would necessitate a cumbersome and lengthy process of petitioning the Commission for changes in that rule, regardless of whether any interested party might contend that any proposed change would be "deficient" under CALEA.

2. Comments of the Center for Democracy and Technology. CDT takes issue with two provisions of J-STD-25, claiming that they exceed the scope of CALEA. To this extent, as the following discussion shows, CDT's position is incorrect.

a. Provision of Cell Site Location Information. CDT contends that J-STD-25 requires wireless and PCS carriers to provide cell site (or "mobile terminal") location information to law enforcement, and that the provision of any location information under any circumstances is prohibited by CALEA. CDT is wrong on both counts.

J-STD-25 does not require location information to be provided; rather, that portion of the standard is entirely optional, and location information is only to be delivered when properly authorized by court order or other statutory means. (See J-STD-25, Section 6.3.8 (4)). More importantly, however, CDT's argument against provision of

this information (CDT comments, pp. 32-34) is based largely on the incorrect contention that the prohibition against providing mobile terminal locations under pen register or trap and trace orders[4] must be extended to all court orders, even full "Title III" content orders. The simple fact is that, had Congress intended to prohibit *entirely* the delivery of mobile terminal location information, it could and would have done so at the same time that it prohibited the delivery of such information under pen register or trap and trace orders.

b. Packet Switching Networks. CDT attacks J-STD-25 for allegedly providing insufficient privacy to users of packet switching networks, and argues that carriers should be forced to separate signaling or addressing information from packet content before any packet-switched data is provided to law enforcement. (CDT comments, pp. 34-38.) CDT's position here is both legally and technically unsound.

As SBC pointed out in its original comments, and as CDT acknowledges in its own comments (at p. 36), providing packet-switched data in the manner provided for by J-STD-25, with both addressing information and content together in each packet, would represent no change from the pre-CALEA *status quo.* CDT seeks to overcome this fact by contending that CALEA imposes on carriers for the first time "...an affirmative obligation to protect communications not authorized to be intercepted." CDT is mistaken, because this obligation is by no means a new one. Carriers, at least since the original enactment of Title III in 1968 (and arguably even before then), have been subject to both civil and criminal liability should they participate in the interception or disclosure of wire communications without appropriate legal authorization. Nevertheless, carriers have relied upon law enforcement to act in accordance with its own statutory obligations to avoid interception or use of communications not authorized to be intercepted, in

[4] 47 U.S.C. §1002(a)(2)(B).

precisely the same manner as would occur with respect to packet-switched data under J-STD-25.

The second prong of CDT's attack on Section 4.5.2 of J-STD-25 asserts in essence that it is a technologically simple matter for carriers to effect the separation of packet addressing information from packet content. (CDT comments, at pp. 36-37). Nothing could be further from the truth. CDT asserts simplistically that "generally available network analysis tools and techniques" and "existing tools for network performance monitoring" permit the type of separation that would satisfy its privacy concerns, but in reality there is every reason to believe that such separation would be enormously complex and prohibitively expensive.

CDT's approach completely ignores the fact that the very nature of packet switching requires that the address information be attached to the packet content, or else the communication will not reach its intended destination. Thus, to separate packet addresses from content would require the capability *in every element of the packet network* to identify a "target" packet out of a stream of literally millions, duplicate the packet, delete the "content", establish a session with the relevant law enforcement agency, assemble a "new" packet with only the addressing information included as its "content", add the law enforcement agency as the new "address", transmit the new packet to law enforcement, and then transmit the unaltered original packet on to its original destination, all within milliseconds so as to maintain the transparency of the transmission to the users. In addition, each network node would have to be "educated" in order to prevent this entire process from recurring at each "way station". Recognizing the huge developmental burden and associated costs that would ensue should this sort of complex

processing be required, the TR45.2 Subcommittee determined that the standard should maintain the pre-CALEA *status quo* because a separation standard compatible with all presently deployed packet networks is not reasonably achievable. The Commission should endorse this determination.

3. Comments of Industry Associations. In addition to the specific references above, SBC supports in general the comments submitted by the Telecommunications Industry Association (TIA), Cellular Telecommunications Industry Association (CTIA) and United States Telephone Association (USTA). These commenters collectively and effectively represent virtually the entire industry upon which the bulk of the burden of CALEA compliance will fall, and the concerns they express are both substantial and nearly unanimous. They bear full and careful consideration by the Commission, in conjunction with the directives of Congress as expressed in CALEA's legislative history. The central message from these sources is that, contrary to the positions taken throughout the Joint Petition and the Comments of the FBI/DOJ, there are more interests to be protected in this proceeding than solely those of law enforcement.

## III. CONCLUSION.

CALEA was not intended to convert the telecommunications industry into a vehicle for perfecting and vastly expanding the reach of law enforcement's electronic surveillance capabilities, nor was it intended to impose on carriers any greater burden than before in terms of privacy protection. Congress intended only to preserve the *status quo* of law enforcement's pre-CALEA surveillance capabilities. Individually and collectively, the companies that make up the affected industry stand ready and willing to comply with CALEA, but only as it was originally conceived and enacted by Congress.

The Commission has full authority to conduct a complete review of J-STD-25, and to approve it or supplant it to whatever extent it deems appropriate. We urge the Commission to exercise the greatest of care in its actions in this proceeding, to ensure that *all* of the interests deemed critical by CALEA's framers are accorded the same importance as they were given in Congress. The best and most efficient way for the Commission to protect those interests and to preserve the intended balance is to approve J-STD-25 as a safe harbor and to reject the contrary arguments of the FBI/DOJ and the CDT.

Respectfully submitted,

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**Certificate of Service**

I, Martha A. Bravo, hereby certify that the foregoing, "Reply Comments of SBC Communications Inc." in Docket No. 97-213 has been filed this 12th day of June, 1998 to the Parties of Record.

Martha A. Bravo

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June 12, 1998